CO-OPERATIVE CENTRAL BANK LTD.

v.

REALVEST PROPERTIES SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-24-1479-89]
10 APRIL 1992

LAND LAW: *Foreclosure proceedings - Was the borrower a member of the Co-operative society - Loan amount was not disbursed to the borrower - Averments in affidavit is it hearsay evidence - Is the loan void for illegality.*

The plaintiff granted loan to one Khalid bin Ramlee and the defendant's land was mortgaged to secure the said loan. Khalid became a member of the plaintiff on 7 December 1983. The charge was also duly registered on 7 December 1983. Although the loan agreement stated specifically that the loan was for Khalid it was however disbursed on 8 December 1983 to the Johore State Economic Development Corporation, Johore Bahru. Further the letter of offer dated 28 November 1983 was only returned to the plaintiff on or about 23 December 1983 when the loan in actual fact had been disbursed on 8 December 1983. It was argued that Khalid was only a national borrower and was acting as an agent for KPSB - a disclosed principal.

The affidavits affirmed by Khalid were exhibited by the defendant in its affidavit in opposition. The plaintiff's Counsel challenged the admissibility of the two affidavits on the grounds that it was hearsay evidence.

Held:

[1] The statement made by Khalid as set out in his two affidavits should be accepted. The affidavit is not suggesting that the statements are true but merely that they have been made and thereby they raise triable issues. Furthermore the statements are indicative of the state of mind of Khalid. For this reason the statements are admissible.

[2] All the evidence adduced do not support any proposal that there is a cause to the contrary. The statement of Khalid cannot be but any lighter than mere allegations and allegations they must remain - they cannot be accepted as the truth otherwise it would be infringing the fundamental rule relating to the admissibility of hearsay evidence. Apart from the statement the defendant has failed to furnish any evidence whatsoever to support his contention that the loan transaction is invalid as it violates s. 30 of the Co-operative Societies Act 1948.

[3] There is nothing in the Co-operative Societies Act 1948 to prohibit a member of a Co-operative Society from getting a loan which was to be utilised for his Corporation. The only condition precedent to an application for a loan is that the said applicant must be a member before he or she is eligible for a loan.

[4] It is well settled that the word “fraud” is used in s. 340(2) of the National Land Code 1965 “actual fraud is dishonesty of some sort not what is called constructive or equitable fraud. Transposing that principle to the present case, I am certainly not prepared to accept the defendants contention that based on the transactions one can impute fraud or conspiracy on the part of the plaintiff is not acceptable.

[5] In the present case assuming Khalid acted as an agent of KPSB when he entered into the loan agreement nevertheless as admitted by him in his affidavit, he executed the said

agreement in his own name as the principal. There is therefore no defence to the claim of the plaintiff.

[6] The parties have agreed to confer on the plaintiff bank the right to be exercised at its absolute discretion to vary the rate of interest including penalty interest at any time so long as notice of such variation has been given to the borrower and charger. That being so, the borrower as well as the defendant as chargor is precluded from complaining. The variation in the interest rate is not unreasonable. In any event the proviso (b) to s. 11 of the Civil Law Act suggests that where there is a provision in a contract stipulating the interest rate that provision must prevail.

[Plaintiff's application allowed.]

Cases referred to:
Subramaniam v. PP [1956] 1 WLR 965 ***(foll)***
Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd. [1926] AC 101 ***(cit)***
Datuk Jaginder Singh v. Tara Rajaretnam [1983] 2 MLJ 196 ***(cit)***
United Malayan Banking Corp. Bhd. v. Datuk Sri Chan Swee Ho & Ors. [1978] 1 MLJ 222 ***(foll)***
Ching Yuen Tung & BEP Akitek [1978] 1 MLJ 211 ***(foll)***
P.C. Pal v. KALR Firm [1924] AIR Rang 46 ***(cit)***
Wallis v. Smith [1882] 21 Ch D 243 ***(cit)***
Balkishen Das v. Run Bahadur Singh [1883] 10 IA 162 ***(foll)***
Yeng Hing Enterprise Sdn. Bhd. v. Datuk Dr. Ong Poh Kah [1988] 1 CLJ (Rep) 313 ***(cit)***

Legislation referred to:
Civil Law Act 1956, s. 11(b)
Co-operative Societies Act 1948, s. 30(1)(a)
Contracts Act 1950, s. 75
Contract Act [Ind], s. 74
National Land Code 1965, ss. 256, 257, 265(2), (3), 340(1), (2)
Rules of the High Court 1980, O. 83 r. 3

For the plaintiff - S. Gunavathi; M/s. Nazri Aziz & Wong
For the defendant - Renu Zechariah; M/s. Anad and Associates

JUDGMENT

Lim Beng Choon J:

The plaintiff by this originating summons filed on 10 July 1989 prayed *inter alia* as follows:

1. That the lands held under Perakuan Pendahuluan Mengenai Hakmilik Pegangan No.1154 Mukim 15, Seberang Prai Tengah, Pulau Pinang (hereinafter called "the said lands") registered in the Register of Charge, Pulau Pinang *vide* Presentation No. 15001/83 Jilid 285, Folio 7 be sold by public auction pursuant to ss. 256 and 257 of the National Land Code 1965 to satisfy the sum due to the plaintiff (chargee) as follows:

   Outstanding sum as at 31 December 1988 -RM6,827,805.43.

   Default interest thereon at the rate of 14.5% per annum on monthly rests from 1 January 1989 on the outstanding balance until the date of full realisation.

2) That a date be specified in which such sale shall be held being a date not less than one month from date of the order therein.

3) That the Senior Assistant Registrar do fix a reserve price for the purpose of the said sale.

4) That within seven days of the sale of the said land the defendant should deliver vacant possession of the said land.

5) For such other directions as the Court should deem fit and just to order.

6) The plaintiff's solicitors costs of and incidental to the application and of the sale be paid by the defendant to the plaintiff.

7) That the proper authorities were required to register the name of the purchasers. (see Encl. 1).

The aforementioned application of the plaintiff was supported by an affidavit (see Encl. 2) affirmed by one Tuan Haji Ahmad Kamal bin Abdullah Al-Yaffi the appointed Receiver of the plaintiff which affidavit was affirmed on 7 July 1989. It was alleged in the Encl. 2 that at all material times, the defendant was the registered proprietor of the said lands and, in consideration of the plaintiff making available to one Khalid bin Ramlee a loan of RM3 million the defendant by a charge in writing and registered on 7 December 1983 charged the said lands to the plaintiff by way of a 1st legal charge *vide* presentation No.1500l/83 Jilid 285 Folio 7 with the Pendaftar Hakmilik Tanah Pulau Pinang and upon the terms and conditions more particularly described therein. A copy of the charge is annexed to Encl. 2 and marked as Exhibit "A1". The deponent of the affidavit then went on to adumberate the more significant express terms of the charge which I will later refer to in this judgment. Apparently Khalid bin Ramlee (hereinafter referred to as "the borrower") defaulted in making payment under the charge and on 13 February 1989, the plaintiff through its solicitors sent a notice of demand to the defendant demanding payment of the sum of RM6,827,805.43 which the plaintiff claimed was due and owing by the borrower as at 31 December 1988 together with default interest thereon at 14.5% per annum on monthly rests from 1 January 1989 to date of full payment. There was no response from the defendant and the plaintiff thereupon sent a statutory notice in Form 16D of the National Land Code 1965 to the defendant on 4 April 1989 (see Exhibit "A3" annexed to the affidavit). The defendant still failed to respond - hence this action.

On 11 October 1989 the defendant applied by way of summons-in-chambers (Encl. 8) for a stay of all proceedings instituted by this originating summons. I need not labour on this application of the defendant as I had dismissed the application on 11 June 1990 and the defendant had not appealed to the Supreme Court against my decision. I shall, however, touch on this application of the defendant later in this judgment insofar as it is relevant to my consideration of the plaintiff's application by way of this originating summons.

Having failed to stay the present proceeding the defendant thereupon filed in an affidavit in opposition affirmed by its director one Roslan bin Hashim (Roslan) on 3 October 1990 (Encl. 13). The deponent averred *inter alia* that by a writ of summons and statement of claim dated 12 March 1988 (the writ proceeding) in Civil Suit No. D3-23-606-88 the plaintiff here instituted an action against *inter alia* one Khalid bin Ramlee to recover the alleged loan of RM3 million. A copy of the writ of summons with a statement of claim is annexed as Exhibit "A1" to the said affidavit. It was also alleged that the plaintiff had applied *vide* summons-in-chambers on 6 September 1988 in the writ proceeding for summary judgment against the said Khalid bin Ramlee who duly affirmed two affidavits opposing the plaintiff's application for summary judgment. Copies of the two affidavits affirmed by the said Khalid bin Ramlee on 15 October 1988 and 17 February 1989 respectively are annexed as Exhibit "A2" to Encl. 13. I do not propose to set out the contents of the two affidavits at this stage as, can be seen later, Counsel for the plaintiff has challenged the admissibility of the two affidavits and the matter has to be resolved first. I need only to say here that Khalid bin Ramlee had, in his affidavits,

raised the issue as to the validity of the loan transaction. The application of the plaintiff for summary judgment in respect of the writ proceeding was dismissed by the Senior Assistant Registrar and the matter went on appeal to the Judge in chambers. As at the relevant time the appeal had yet to be heard by the trial Judge. In any case it is the contention of the defendant that since the entire loan transaction is void, the question of repayment on sale of the said lands would not arise. The defendant further contended that as there is a substantial dispute as to the facts in the present proceeding the originating summons should be converted to a writ action.

In rebutting the contentions of the defendant, the plaintiff filed in a further affidavit affirmed by its Receiver, Haji Ahmad Kamal b. Abdullah Al-Yafi (Haji Kamal) on 29 January 1991 (Encl. 14). The deponent averred *inter alia* that in reply to the affidavits affirmed by Khalid bin Ramlee in the writ proceeding the plaintiff had filed an affidavit-in-reply affirmed by one Jayamany s/o Sengodan on 29 November 1988 which has been annexed as Exhibit "AK1" to this further affidavit. Again I shall not set out the contents of the said affidavit of Jayamany s/o Sengodan at this stage for the same reason as stated above concerning the affidavits of Khalid bin Ramlee. It is further alleged that the Senior Assistant Registrar dismissed the plaintiff's application for summary judgment in the writ proceeding as she was of the opinion that there was a triable issue but she did not state that the loan transaction in question was illegal or that the transaction was void. In any case it is contended that there is no substantial dispute as to the facts and the allegations of Khalid bin Ramlee in his aforesaid affidavit were irrelevant to this action made by way of originating summons. The only particulars that are relevant and required under O. 83 r. 3 of the Rules of the High Court 1980 are as follows:

(a) The amount advanced is RM3 million.

(b) The amount which has been repaid to date by the defendant in settlement of the loan is in the sum of RM284,796.05

(c) The amount outstanding at the date of the issue of this originating summons, that is, 10 July 1989 is RM7,351,934.28 and the affidavit in support, that is, 7 July 1989 is RM7,344,106.67.

(d) The total outstanding sum due from the defendant as at the date of the hearing of this originating summons, that is, 30 January 1991 is RM9,009,026.35 together with normal and default interest amounting to a total of 13% per annum on monthly rest which continues to accrue from 31 January 1991 till date of full realisation. A statement of account is annexed as Exhibit "AK2" to the said affidavit showing full particulars of the outstanding sum.

(e) The daily interest chargeable for the month of January 1991 was RM3,174.77 per day.

Thereafter the plaintiff filed another supplemental affidavit affirmed by Haji Kamal on 6 November 1991 (Encl. 16). It is alleged therein that the total outstanding sum due from the defendant as at 11 September 1991 is RM7,816,304 together with normal and default interest at the rate of 13% per annum on monthly rest which continues to accrue from 12 September 1991 till date of realisation. Another statement of account is annexed as Exhibit "AC1" to the said affidavit. The daily interest for the month of September was RM2,773.05 per day.

In his written submission Counsel for the defendant raised the following issues:

1. the validity of the loan transaction is entirely in question and the defendant submits that the said loan transaction is void for illegality.

2. the loan was actually granted to Kemajuan Perkasa Sdn. Bhd. (KPSB), of which the plaintiff was at all times aware and therefore the plaintiff knew that Khalid bin Ramlee was acting as agent for a disclosed principal.

3. the default interest claimed by the plaintiff is not maintainable.

4. there is a discrepancy in the amounts owed to the plaintiff.

Issue 1 - Validity of the Loan Transaction.

Counsel says:

(a) section 30 of the Co-operative Societies Act 1948 provides that loan from co-operative societies can only be granted to members;

(b) to circumvent this section, the plaintiff accepted Khalid bin Ramlee as a notional borrower when in actual fact the real borrower was KPSB and KPSB was never a member of the plaintiff nor was it eligible to be a member;

(c) the loan agreement stated specifically that the loan was for Khalid bin Ramlee but in actual fact the loan amount of RM2,949,754.50 was disbursed on 8 December 1983 to the Johore State Economic Development Corp. Johore Bahru;

(d) the letter of offer dated 28 November 1983 was only returned to the plaintiff on or about 23 December 1983 when the loan in actual fact had been disbursed on 8 December 1983;

(e) Khalid bin Ramlee, the notional borrower, became a member of the plaintiff on or about 7 December 1983;

(f) the plaintiff's knowledge that the actual borrower was KPSB can be inferred since it was KPSB who paid all interest charges of the loan, the processing fee, service fee and membership fee of Khalid bin Ramlee. The minutes of the board of directors meeting of KPSB approving the said lands to be charged to the plaintiff as security were sent to the plaintiff. Furthermore when the tenure of the loan was going to expire, KPSB corresponded with the plaintiff to renew the loan. Finally the balance of the loan of RM3 million, that is, RM50,245.50 was released to KPSB on 12 December 1983.

In considering this first issue, I must bear in mind that this first issue arises from the contents of the affidavit of Khalid bin Ramlee affirmed on 15 October 1988. It is contention of the Counsel for the plaintiff that the averments of Khalid bin Ramlee as set out in his affidavit of 15 October 1988 are inadmissible on the ground that they are hearsay evidence. Now it has been settled by the Privy Council in the case of *Subramaniam v. PP* [1956] 1 WLR 965 @ 970 that:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that the statement was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other persons in whose presence the statement was made.

In the present case I am prepared to accept the statements made by Khalid bin Ramlee as set out in his two affidavits exhibited as 'A2' in Encl. 13 only insofar as they are indicative of the allegations of the said Khalid in opposing the writ proceeding instituted by the plaintiff in Civil Suit No. D3-23-606-88. I am not concerned with the truth or otherwise of the statement. Indeed the defendant is not suggesting that the statements are true but merely that they

have been made and thereby they raise triable issues. Furthermore the statements as can be seen later, are indicative of the state of mind of the said Khalid. For this reason I am satisfied that the statement are admissible.

The contention of the defendant in respect of the first issue hinges on the argument that as Khalid Ramlee was only a notional borrower when in actual fact the real borrower was KPSB the loan transaction is invalid as it infringes s. 30(1)(a) of the Co-operative Societies Act 1948 which provides:

> A registered society may make loans:
>
> (a) to its members ...

Now it is common place that Khalid bin Ramlee became a member of the plaintiff on 7 December 1983. There is also no dispute that the charge over the said lands was made to secure the said lands for the loan up to a sum of RM3 million granted to Khalid bin Ramlee and the charge instrument Borang 16A was properly and lawfully signed by the pengarah and setiausaha of the defendant company together with the official seal duly stamped on it. The charge was duly registered by the Pendaftar Hakmilik Tanah, Pulau Pinang on 7 December 1983 that is to say on the same day as the said Khalid became a member. The said Khalid defaulted in making repayment to the loan and the appropriate letters of demand inclusive of the statutory Form 16D had been duly served on the defendant. Basing on these undisputed facts the plaintiff has established a *prima facie* case to justify its right to apply to this Court for an order for the sale of the said lands pursuant to subsection (2) of s. 265 of the National Land Code and under subsection (3) of the said section the Court is encumbered to grant an order for the sale of the land so charged "unless it is satisfied of the existence of cause to the contrary." What then is "the cause to the contrary" that prevents me from granting an order for the sale of the said lands? The short answer is none whatsoever. I say so simply because all the evidence adduced in this action do not support any proposal that there is a cause to the contrary. In arriving at this conclusion I am not unmindful of the statement made by Khalid bin Ramlee in his affidavit exhibited as "A2" to Encl. 13. As I have stated earlier the statement so made cannot be put any higher than mere allegation and allegations they must remain - they cannot be accepted as the truth otherwise I would be infringing the fundamental rule relating to the admissibility of hearsay evidence. There is no doubt that apart from the statements of the said Khalid the defendant has failed to furnish any evidence whatsoever to support his contention that the loan transaction is invalid as it violates s. 30 of the Co-operative Societies Act 1948. On this ground alone the defendant's objection must be rejected.

However that may be even assuming that I could consider the statements made by Khalid bin Ramlee in his affidavit (Exhibit 'A2' annexed to Encl. 13) I would say that they could only go to show that:

Khalid bin Ramlee was at all material times one of the directors of KPSB. There was an understanding between him and one Lorraine Esme Osman, the major shareholder of KPSB whereby the said Khalid agreed to become a member of the plaintiff bank in order to get a loan not exceeding RM3 million and that KPSB would take all necessary steps to assist him and to act as his guarantor for the loan which was with the consent of both parties to be used by KPSB to promote its business activities. Pursuant to the aforesaid understanding the board of directors of KPSB passed a resolution at a meeting chaired by the said Khalid held on 17 November 1983 at 2.00 p.m. (this resolution is annexed to the affidavit Encl. 13) approving the creation of a charge over the land of KPSB held under Lot 39, Persiaran Duta, Lorong Duta 2, Mukim of Kuala Lumpur to the plaintiff as security for the said loan. Likewise

the board of directors of the defendant company held a meeting also on 17 November 1983 at 10.00 a.m. which was chaired by Khalid bin Ramlee whereby a resolution was passed to charge its lands held under Holdings No.1154 Lot Nos. 1191 and 1192 to the plaintiff as further security for the said loan to be granted to the said Khalid (this resolution is annexed to Encl. 13). Thereafter on 6 December 1983 the said Khalid in his capacity as director of KPSB by letter applied to the plaintiff to become a member of its bank. In the letter he enclosed *inter alia* a membership application form where it was also mentioned that a sum of RM1,000 had earlier been paid for one share of the plaintiff bank, a cheque for the sum of RM150 being service fee, resolutions of KPSB and the defendant company respectively consenting to the charge of their respective properties resolution of KPSB authorising the said Khalid to avail an overdraft of RM3 million from the plaintiff bank, a memorandum and articles of association, Forms 49 of KPSB and one Lorak Properties Sdn. Bhd. The entrance fee of RM2 in respect of the said Khalid's application as member of the plaintiff bank was duly sent to the plaintiff bank on 7 December 1983 by one Ms. Teh Siew Lin another director and manager corporate finance of KPSB. All these transactions were carried out by letters which have been annexed as exhibits to Encl. 13. From the aforesaid transactions the inevitable inferences that one can draw are these. KPSB was in urgent need of funds to carry out certain projects and the said Khalid agreed to become a member of the plaintiff bank in order to get a loan to finance these projects which certainly would to a certain extent be beneficial to the said Khalid as well as to enhance his position in KPSB. The defendant company too agreed to assist the said Khalid to get the loan to finance these projects. Thereupon negotiations were carried out with the plaintiff bank and as a result the plaintiff bank agreed to furnish the loan subject to its own terms which must include (i) the said Khalid becoming a member and (ii) KPSB as well as the defendant company charging their lands as security for the loan. The offer of the plaintiff was made by letter dated 28 November 1983 and this offer letter was referred to by the said Khalid in his reply dated 23 December 1983 which was annexed as exhibit to Encl. 13. The day following the registration of the said Khalid as member and the registration of the charge of the defendants' lands on 7 December 1983, the plaintiff bank dispersed the loan to the said Khalid. No doubt on the instruction of the said Khalid in his capacity as director of KPSB a sum of RM2,949,754.50 was sent by telegraphic transfer to the account of the Johore State Economic Dvpt. Corp. at Bank Bumiputra, Johore Bahru and the remaining sum of the loan was paid direct to the said Khalid who duly acknowledged receipt of the same (see his letter annexed as exhibit to Encl. 13). I say that the sum of RM2,949,754.50 was sent at the request of the said Khalid simply because there is no reason whatsoever for the plaintiff bank to do so unless the said Khalid as director of KPSB had directed it to do so and the money was no doubt to meet with KPSB commitment in a project with the Johore State Economic Dvpt. Corp. On 23 December 1983 the said Khalid duly returned the signed duplicate copy of the offer letter of the plaintiff bank dated 28 November 1983. Thereafter KPSB regularly paid to the plaintiff's bank the interest payment of the loan on behalf of the said Khalid. These payments was made until 30 November 1984 when the interest fell into arrear for some months and the director of KPSB applied to the plaintiff bank for time to make payments. In December 1984 KPSB proposed that Lorrain Esme Osman would give a personal letter of guarantee in respect of the loan which he duly did and also an offer to create a third party charge over other lands of KPSB if the plaintiff bank would release the charge in respect of the lands earlier charged to it. Apparently the plaintiff bank would not agree.

Based on the aforesaid transactions the defendants as stated earlier, urged me to hold that the loan agreement granting the overdraft facilities not exceeding RM3 million to Khalid bin Ramlee was invalid as it contravened s. 30(1)(a) of the Co-operative Societies Act 1948. I

regret to state that I cannot agree with the suggestion of the defendant simply because even assuming that the contents of the affidavit of Khalid bin Ramlee could be admissible as evidence, the allegations as stated in the said affidavit could only go to show that the said Khalid became a member of the plaintiff in order to get a loan to be utilised for the business activities of a corp. of which he was at all material times, a director. Now there is nothing whatsoever in the Co-operative Societies Act 1948 to prohibit a member of a co-operative society from getting a loan which was to be utilised for his corp. The only condition precedent to an application for a loan is that the said applicant must be a member before he or she is eligible for a loan. It cannot be disputed that the matters which the lending co-operative society must take into consideration before granting a loan are (i) that the applicant for a loan is a member and (ii) the applicant is in a position to repay the loan and/or there is sufficient security put up for the loan. How the loan was to be utilised by the member is of no concern of the lending co-operative society. In support of this proposition I would refer to the unreported judgment of Siti Norma Yaakob J delivered on 22 September 1986 in the case of the *Co-operative Central Bank Ltd. v. Gayabaru Construction Bhd.* where it is said:

> Since s. 30(1)(a) of the Act empowers a registered society to make loans to its members, I do not see anything objectionable to the plaintiff granting the loan to Seah who afterall is one of its members. As the section does not specify to what purpose such a loan should be utilised, I also do not see anything objectionable to Seah using the loan granted by the plaintiff for the benefit of the defendant of which he is its managing director. As lending money to Seah must be one of the objects of the plaintiff to which s. 4 of the Act applies, I hold that the loan is valid and is enforceable against the defendant, the chargor, who provided the security for the loan.

With due respect, I can do no better than to adopt the reasoning of Siti Norma Yaakob J.

In further support of the conclusion reached by me as stated above, I also took note of the fact that the charge over the lands of the defendant had duly been registered under the National Land Code 1965 and as such the plaintiff has acquired an indefeasible interest pursuant to subsection (1) of s. 340 of the said Code and could only be defeated pursuant to subsection (2) of that section. The defendant has submitted that the only inference that can be drawn from the transactions as set out above is that the plaintiff has committed fraud when granting the loan in that it had deliberately assisted KPSB to get a loan in contravention of s. 30(1)(a) of the Co-operative Societies Act 1948. Again with respect I cannot agree. It is well settled that the word "fraud" as used in s. 340(2) of the National Land Code 1965 means "actual fraud, that is, dishonesty of some sort not what is called constructive or equitable fraud." - see *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* [1926] AC 101 @ 106. The principle laid down by the Privy Council in the *Waimiha's* case has been cited with approval by our Federal Court in *Datuk Jaginder Singh v. Tara Rajaretnam* [1983] 2 MLJ 196 @ 201. Transposing that principle to the present case, I am certainly not prepared to accept the defendant's contention that based on the transactions as set out above one can impute fraud or conspiracy on the part of the plaintiff. At its highest I can only say that the plaintiff knew or ought to have known that Khalid bin Ramlee became a member in order to get a loan to finance KPSB of which he was a director. As stated earlier there is no legal prohibition against the plaintiff granting a loan to its members to carry out the business activities of a company of which he is a director. Far from establishing fraud or conspiracy the contents of the said Khalid's affidavit affirmed that the loan was granted to him within the scope of s. 30 of the Co-operative Societies Act 1948.

With regard to the points raised by Counsel for the defendant which I have adumberated earlier, I certainly cannot accept the suggestions made by the learned Counsel. Even assuming

that it is true that the loan amount of RM2,949,754.50 was disbursed to the Johore State Economic Dvpt. Corp., it only shows that the said disbursal was done with the approval or at least with the consent of Khalid bin Ramlee. This proposition is supported by a letter from the plaintiff dated 12 December 1983 forwarding a cheque for a sum of RM50,245.50 being the final disbursal of the loan amount in favour of KPSB direct to Khalid bin Ramlee personally. Hence the said Khalid not only agreed to the disbursal of the loan amount of RM2,949,754.50 to the Johore State Economic Devpt. Corp. but also his acquiescing to the remaining part of the loan to be given to KPSB. As to the return of the loan agreement on or about 23 December 1983 when the loan was disbursed prior to that date, the only logical inference that can be drawn is that the said Khalid had indicated his acceptance of the terms and conditions as set out in the loan agreement before the disbursal of the loan was made with approval or consent. The return of the loan agreement on 23 December 1983 duly executed merely confirmed what had already been agreed by him. Finally the fact that KPSB paid the interest charges of the loan and that it corresponded with the plaintiff to extend the period of the repayment of the loan only goes to show that the said Khalid as director of KPSB had the backing of his company in respect of the loan agreement executed by him in that his company undertook to repay the loan amount of which his company stood as guarantor and in respect of which it had charged its lands as security for the loan. In any case the most that can be said in favour of the defendant is that the plaintiff knew or ought to have known that the loan transaction of the said Khalid was fully supported by his company KPSB who was prepared to give an unconditional guarantee regarding the repayment of the loan and who was prepared to and did charge its lands as security. That being so can it be said that the plaintiff had participated or conspired with KPSB to contravene s. 30 of the Co-operative Societies Act 1948? The answer can only be an absolute no. Furthermore it is futile under the circumstances to impute fraud or even attempted fraud on the part of the plaintiff. For the aforesaid reasons issue 1 raised by the defendant must be rejected.

Issue 2 - Khalid bin Ramlee Was Acting As Agent For a Disclosed Principal.

The answer to this issue can be found in the judgments of the Federal Court in *United Malayan Banking Corp. Bhd. v. Datuk Sri Chan Swee Ho & Ors.* [1978] 1 MLJ 222 and *Ching Yuen Tung and BEP Akitek* [1978] 1 MLJ 211 where it was held that if an agent entered into a contract in his own name as principal, he was nevertheless liable personally. This is so regardless of whether his principal is disclosed or not at the time of the contract. In the present case assuming again that the said Khalid acted as agent of KPSB when he entered into the loan agreement nevertheless as admitted by him in his affidavit, he executed the said agreement in his own name as the principal. There is therefore no defence to the claims of the plaintiff. Likewise issue 2 must be rejected.

Issue 3 - Default Interest Not Maintainable:

The submission of the defendant on this issue is that the interest of 20% per annum being imposed is by way of a penalty and the plaintiff is only entitled to "reasonable compensation" pursuant to s. 75 of the Contracts Act 1950. He further submits that what constitutes "reasonable compensation" within the meaning of the said s. 75 is a question of fact and only a full trial with the evidence of witnesses will be able to ascertain this. No authority is cited to support his submission. That being the case it is useful to examine the Indian case law regarding the scope of s. 74 of the Indian Contract Act 1872 which is in *para materia* with our s. 75. It has been said by the Indian Courts that a stipulation for an increased rate of interest from **the date of default** is not generally a penalty but such a stipulation may in some cases be penal. Whether it is a penalty or not is a question of construction. It is for

the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of a penalty (see *P.C. Pal v. KALR Firm* AIR [1924] Rang 46). It has also been said that a contract including a penalty interest clause must be held valid where there is no question of fraud, oppression, improper dealing exorbitant amount or dealing with an ignorant person. The Calcutta Court also cited the following passage from the English case of *Wallis v. Smith* [1882] 21 Ch. D. 243

> ... it is of the utmost important as regards contracts between adult persons not under disability and at arm's length that the Courts of law should maintain the performance of the contracts to the intention of the parties.

Then there is the case of *Balkishen Das v. Run Bahadur Singh* [1883] 10 IA 162 where the Privy Council held *inter alia* that the payment of a higher rate of interest at 12% per annum from the date of default instead of the agreed rate of interest at 6% per annum is not unreasonable.

Transposing the principles laid down in the aforementioned authorities, it is to be noted that Article 3.1 of the charge annexure provides that the interest rate is to be 14.5% per annum on monthly rests (which is referred to as the prescribed rate which expression "shall include such other rate or rates which the bank may at any time and from time to time stipulate."). Article 3.2 therein says:

> In the event that any amount due under this agreement (whether of principal or interest or otherwise including interest due under this Article) is not received by the bank on the due date, the chargor shall pay to the bank interest at the rate of ONE AND ONE-THIRD (1-1/3) times the normal ruling rate of interest on the sum in arrears calculated retrospectively from the due date of such default until the date of the payment of the amount thereof.

Article 3.3 stipulates that notwithstanding the provisions relating to the rate of interest therein before provided the plaintiff would be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the borrower and the chargor. Finally Article 3.5 speaks about capitalisation of interest.

To my mind the cumulative effect of the aforementioned articles is that the parties have agreed to confer on the plaintiff bank the right to be exercised at its absolute discretion to vary the rate of interest including penalty interest at any time so long as notice of such variation has been given to the borrower and chargor. That being so, the borrower as well as the defendant as chargor is precluded from complaining. However that may be in view of the provision of s. 75 of the Contracts Act 1950, I feel I am bound to consider whether under the circumstances of the present case the variation of the interest rate from 14.5% to 15% per annum, 19.3% per annum, 20% per annum and reverting to 13% per annum at diverse dates is reasonable or otherwise. It is to be noted that there is no complaint regarding the giving of the required notice of variation to the borrower and the defendant. Bearing in mind that the highest rate imposed was no more than 5.5% above the prescribed rate and the lowest rate was even below the prescribed rate I do not think that the variation is unreasonable in the light of what had been said by the Privy Council in the *Balkishen Das* Case *(supra)* which was decided over a century ago.

In any event the proviso (b) to s. 11 of the Civil Law Act suggests that where there is provision in a contract stipulating the interest rate that provision must prevail. Our Supreme Court has suggested in the case of *Yeng Hing Enterprise Sdn. Bhd. v. Datuk Dr. Ong Poh Kah* [1988] 1 CLJ (Rep) 313 that compound interest would be payable if the parties had expressly or implicitly provided in the agreement.

Issue 3 raised by the defendant must therefore be rejected.

Issue 4 - Discrepancy In the Amounts Owed.

With regard to issue 4 and from the submission of Counsel for the plaintiff, the contention is not about any inconsistency in the two statements of account of the defendant annexed as Exhibits "AK1" in the further affidavit and the supplemental affidavit of Hj. Ahmad Kamal affirmed on 5 April 1991 (Encl. 15) and 6 November 1991 (Encl. 16). The learned Counsel in fact argued that since on 10 April 1991 the total outstanding sum due from the defendant was RM9,237,867.84 as stated in Encl. 15 and on 11 September 1991 the total outstanding sum was reduced to RM7,816,370.04, there must therefore had been some repayments made by the defendant. Such being the case, the plaintiff should not proceed with this originating summons to pray "for an order for sale while having accepted the remittance". I cannot see any relevancy in this line of argument. It is clear from Article 7.1 of the charge annexure that should the chargor *inter alia* commit any default in the repayment of the loan the plaintiff bank is entitled to terminate the loan agreement and thereafter the loan together with the accrued interest thereon to the date of actual payment and all other sums payable thereunder would be immediately due and payable. In addition Article 8.1 provides:

> Upon the happening of any event of default mentioned in Article VII above and so long as the same shall continue unremedied, it shall be lawful for the Bank forthwith to give notice to the Chargor pursuant to the provisions of the National Land Code requiring the Chargor to remedy the said default within a period of fourteen (14) days from the date of such notice... and if at the expiry of the period specified in such notice as aforesaid the Chargor fails to remedy the breach specified therein the bank may apply for an order for sale of the said land pursuant to the provisions of the National Land Code.

There is no quarrel that the plaintiff through its solicitors had duly served the required notice of default in Form 16D and that it was stated therein that the defendant was required to remedy the default by paying the total outstanding loan amount which as at 31 December 1988 was RM6,827,805.43 **together** with default interest thereon at the rate of 14.5% per annum on monthly rests from 1 January 1989 till date of full payment. There is likewise no quarrel that on or about 15 August 1991 the total outstanding loan amount was RM9,737,306.31 between 16 August 1991 till 10 September 1991 the defendant or the borrower had made some repayments amounting to RM1,920,936.27. Hence the total outstanding sum as at 11 September 1991 was RM7,816,370.04. Now the defendant is contractually encumbered to remedy the breach as specified in the said Form 16D and partial repayment is certainly not anyway near to "remedy the breach." On the other hand the plaintiff is entitled to accept any partial repayment and such acceptance should not be pursuant to Article 10.1 of the charge annexure, construed as a waiver or acquiescance in such default nor should such acceptance of partial repayment "affect or impair any right, power or remedy of the bank in respect of any other or subsequent default. In the present case the continued non repayment of the total outstanding loan amount with interest to my mind amounts to "subsequent defaults." Issue 4 raised by the defendant is therefore rejected.

In the ultimate analysis judgment must be given to the plaintiff and I grant an order in terms of this originating summons. Costs to be paid by the defendant.

Also found at [1992] 3 CLJ 1485